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No. 99-556

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

LINDA BAKER, Personal Representative
of the Estate of Phil Baker, Deceased,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE GEORGIA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT DISPUTES PETITIONER'S ASSERTIONS REGARDING THE QUESTION PRESENTED, JURISDICTION AND THE STATEMENT OF THE CASE

The Georgia Court of Appeals held in this Federal Employers' Liability Act ("FELA") personal injury and wrongful death action that the unchallenged testimony of plaintiff's lead expert witness was more than sufficient to authorize the jury's finding that diesel exhaust caused, or played a role in causing, the decedent's fatal nasopharyngeal cancer. 514 S.E.2d 448, 452 (Ga. Ct. App. 1999) (hereinafter "Ct. App. Op.", a copy of which is reproduced in the Appendix to the Petition for Certiorari.) Defendant Norfolk Southern Railway Company ("Norfolk Southern"), having failed to persuade the Georgia Supreme Court to grant its petition for certiorari, now petitions the United States Supreme Court to grant certiorari on an issue that was never raised in the state courts and was not decided by the Georgia Court of Appeals. In its petition, Norfolk Southern not only asserts a federal question never raised below, but in an apparent effort to persuade this Court to review the case, it grossly misstates and distorts the record evidence regarding the factual background. In accordance with Rule 24 of the Rules of the Supreme Court of the United States, Respondent Linda Baker first will set out her disagreement with the presentation of Petitioner Norfolk Southern regarding the "Question Presented", Jurisdiction, and the Statement of the Case.

A. Question Presented

Norfolk Southern asserts that the "Question Presented" is whether unreliable opinion testimony may constitute sufficient evidence in an FELA case. That "Question" was never raised in the state courts and was not decided by the Georgia Court of Appeals. Petitioner never objected to the referenced opinion testimony at trial, did not raise the issue at trial or in the Court of Appeals, and never sought to have the Supreme Court of Georgia decide the question. Norfolk Southern cannot assert the question for the first time in the United States Supreme Court. Moreover, the premise of its statement of the issue, that the opinion testimony was not reliable, is incorrect. The testimony was "scientifically reliable", was admissible under the governing Georgia statute, and would have been admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

B. Jurisdiction

This Court lacks jurisdiction to hear this state court case because the alleged federal questions were not raised in the state courts and not decided by the highest court in the state. The relevant jurisdiction statute, 28 U.S.C. § 1257(a), does not provide for jurisdiction unless the federal issues were raised and decided by the state court. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

C. Statement of the Case

Respondent Linda Baker also disputes Norfolk Southern's Statement of the Case. Petitioner has distorted the nature of plaintiff's claim and misstated the record evidence on medical causation. The basis for recovery, which

was not challenged on appeal, was that Norfolk Southern failed to provide Phil Baker with a safe place to work, in violation of FELA and the Locomotive Boiler Inspection Act, by not using reasonable and appropriate means to prevent the entry of hazardous levels of diesel exhaust into the locomotive cabs in which Mr. Baker worked, as required by 49 C.F.R. § 229.43, long after it knew that it was exposing its employees such as Mr. Baker to hazardous levels of diesel exhaust.

Contrary to the suggestion of Norfolk Southern in its Petition, the alleged negligence was not merely that Mr. Baker was exposed to normal levels of diesel exhaust. Rather, the record evidence was that Norfolk Southern was the only major American railroad which operated its locomotives with the exhaust stack in front on the unairconditioned cab such that diesel exhaust from the stack poured into the cab, filling it with black smoke. (Transcript, hereinafter "T.", 210, 81, 85, 387, 391). Norfolk Southern received numerous complaints from its train crews that diesel exhaust was making them sick. (T.867-68, 923-28). Norfolk Southern in turn complained to the manufacturer, the General Electric Company, who investigated the problem and concluded that the only effective solution was to run the locomotives with the short hood forward, like other railroads, so that the exhaust stack was behind the cab. (T.287-90, 298-99). Norfolk Southern refused to change its practice despite GE's recommendation. (T.299).

Norfolk Southern knew that exposure to excessive levels of diesel exhaust was hazardous to its employees. It had been known for years that diesel exhaust causes eye and throat irritation, chronic respiratory disease, and contains various carcinogens. (T.607, 645, 734, 979). As early as 1979, the

U.S. Environmental Protection Agency was considering regulating diesel exhaust under the Clean Air Act because it had been found to be mutagenic, and therefore was presumed to be a cancer-causing agent. (T.725-739). By the mid-1980s various studies had found that diesel exhaust caused cancer in laboratory animals, and a major study by the Harvard School of Public Health found that diesel exhaust caused cancer in railroad workers. (T.642, 741, 789-90). Finally, in 1988, the National Institute of Occupational Safety and Health ("NIOSH"), concluded that diesel exhaust caused cancer and recommended that workplace exposure be minimized. Norfolk Southern was aware of the studies and the NIOSH recommendations, but it took no action to reduce diesel exhaust exposure to its train crews. (T.877-78).

Not only did NIOSH consider diesel exhaust a probable human carcinogen, the U.S. Environmental Protection Agency and the World Health Organization's International Agency for Research on Cancer have concluded that diesel exhaust is a probable human carcinogen. (T.736, 744, 748, 751-52). Diesel exhaust contains many of the same carcinogens as cigarette smoke but in much higher concentrations.

Despite the almost universal agreement in the scientific community that diesel exhaust causes human respiratory cancer, Norfolk Southern in its Petition labels the scientific evidence of causation in this case as unreliable, and in fact premises its whole argument on that unsubstantiated assertion. The record evidence of causation in this case was overwhelming. It was admissible and sufficient under any relevant standard, including the federal rule set out in *Daubert*.

In 1991, after years of exposure to diesel exhaust because of Norfolk Southern's refusal to operate its locomotives properly, Phil Baker was diagnosed with nasopharyngeal cancer. Mr. Baker received high dose radiation and chemotherapy, causing him excruciating pain and disabling him. (T.518-19). When Mr. Baker's condition temporarily improved, his principal physician, Dr. Robert Howard, had to make a recommendation about returning to work. Dr. Howard researched the literature, and based upon his own knowledge and experience with cancer causation, advised Mr. Baker not to return to work because his exposure to diesel exhaust at work probably was the cause of the cancer. (T.519-20).

Toxicologist Dr. Richard Lipsey did an exposure assessment and calculated the levels of various chemical components of diesel exhaust to which Mr. Baker had been exposed at Norfolk Southern. (T.598, 602-606). The levels were in excess of those permitted by the U.S. Occupational Safety and Health Administration. (T.609). Although Dr. Lipsey was not permitted to testify as to medical causation regarding Mr. Baker, as a toxicologist he was allowed to testify that diesel exhaust causes nasopharyngeal cancer. (T.611).

Samuel Epstein, M.D., a full Professor of Occupational and Environmental Health at the School of Public Health, University of Illinois, author of several books and numerous articles on cancer causation, and an internationally-recognized expert in the field, testified that in his opinion, Mr. Baker's diesel exhaust exposure at Norfolk Southern caused his nasopharyngeal cancer. (T.728). The basis for his opinion was that diesel exhaust contained numerous recognized carcinogens, that diesel exhaust had been

confirmed as a mutagenic, that diesel exhaust and its components caused cancer, including nasopharyngeal cancer, in well-designed animal tests, and that diesel exhaust and its components had been found to cause cancer, including nasopharyngeal cancer, in over forty human studies, involving thousands of exposed workers. (T.728-744). As a result, every governmental or independent research group who had evaluated diesel exhaust regarded it as a cancer-causing agent. (*Id.* and 642-44).

Norfolk Southern asserts on page 4 of its Petition that the expert witnesses "could not identify even a *single* epidemiological study linking diesel exhaust with nasopharyngeal cancer." In fact, both Dr. Epstein and Dr. Lipsey identified three studies linking whole diesel exhaust with nasopharyngeal cancer, (T.729-32), and approximately forty studies, involving thousand of workers, which "clearly showed the association of formaldehyde, [one of the principal components of diesel exhaust], and nasopharyngeal cancer." (T.742-43).

Norfolk Southern also misstates the record evidence regarding smoking, drinking and woodworking. It claims on page 2 of its Petition that "Mr. Baker smoked cigarettes, drank heavily, and did woodworking — all activities known to cause cancer of the nasopharynx." The undisputed evidence was that Mr. Baker quit smoking and drinking years before he got cancer. (T.70-71). More importantly, there was no evidence, even from Norfolk Southern's experts that smoking, drinking or woodworking caused Mr. Baker's cancer. Norfolk Southern's expert testified that there were studies going both ways and "the jury is still out." (T.960-64). Mr. Baker's treating physician, Dr. Howard, testified that neither the history of smoking or drinking had anything

to do with the cancer. (T.525-27). Dr. Epstein agreed and pointed out that none of the U.S. Surgeon General reports on smoking and health had even listed nasopharyngeal cancer as a cancer caused by smoking, and that there was no evidence that alcohol consumption caused nasopharyngeal cancer. (T.744-45, 749-50). Dr. Mark Williams, Mr. Baker's treating radiation oncologist, testified that alcohol and tobacco abuse have not been shown to be risk factors for nasopharyngeal cancer. (T.475). Similarly there was no evidence that woodworking had anything to do with causing the cancer.

Norfolk Southern also misleads this Court regarding the proceedings below, particularly in regard to whether it raised the issue now asserted. It implies that it properly objected to the causation testimony by filing a motion in limine. Although Norfolk Southern filed a motion in limine almost a year before trial, it did not insist on a ruling before or during trial and it never objected to the introduction of the evidence at trial. Under Georgia procedural law the failure to insist on a ruling on the motion and the failure to object to the admission of the testimony waives any assertion of error on the matter. *Heffernan v. Home Depot USA, Inc.*, 226 Ga. App. 167, 486 S.E.2d 51 (1997) and *Delong v. State*, 185 Ga. App. 314, 363 S.E.2d 811 (1987). Norfolk Southern simply failed to preserve any issue regarding the admissibility of the medical causation evidence for appeal.

ARGUMENT

THE PETITION FOR CERTIORARI SHOULD BE DENIED

A. The Question Presented by Norfolk Southern in the Petition Was Not Preserved For Appeal Because It Was Not Raised in the Georgia Courts.

1. The Question Presented Must Have Been Raised and Decided Below.

The jurisdictional statute and controlling authority require that the tendered federal questions for Supreme Court review must have been asserted in and decided by the state courts. This Court has long maintained that it will not consider questions that are raised for the first time in seeking review of a state court decision. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Sometimes this Court has stated that it had "no jurisdiction" to consider an argument which was not preserved by being properly raised below. *See, e.g., Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). In other cases this Court has simply repeated the black letter principle that because the argument was not presented in the state courts, it will not be addressed by the Supreme Court. *See, e.g., Riggins v. Nevada*, 504 U.S. 127, 133 (1992). Whatever the rationale, there can be no doubt that a fundamental procedural requirement is that the question presented was in fact at issue and decided by the state court.

There are powerful policy considerations underlying the procedural requirement that federal questions first be presented to the state courts. As Justice White explained in *Webb v. Webb,* 451 U.S. 493 (1981):

> Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements.

Id. at 499. There are also important practical considerations for insisting that federal issues be raised first in the state court system, including the development of an adequate record and the consideration of independent state grounds. *Cardinale v. Louisiana, supra*, at 439.

As a result of these considerations, the party seeking review must carry the burden of proving that the federal questions were presented to the state courts. *Webb v. Webb, supra*, at 495; and Rule 14(g)(i) of the Rules of the Supreme Court of the United States. It is not sufficient to present the questions only to an intermediate appellate court. They must be presented to the highest state court. *Connecticut Mut. Life Ins. Co. v. Moore*, 333 U.S 541, 544 (1948). Moreover, this Court has frequently stated that "when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts". *Street v. New York*, 394 U.S. 576, 582 (1969).

2. Norfolk Southern Did Not Raise the Federal Question in State Court.

Norfolk Southern did not preserve for review the federal issues it asserts in its Petition because it did not properly raise them in the Georgia courts. It attempts to avoid the fact that it did not raise the issues by stating the Question

Presented in a fashion that obscures its real arguments. It asserts that the Question Presented is whether opinion testimony that does not meet the requirements of *Daubert* constitutes sufficient evidence of causation in an FELA case. It further claims that there is a split in the federal circuits on the sufficiency of evidence standard in an FELA case and that the Georgia Court of Appeals adopted a scintilla of evidence standard.

In reality the Question Presented includes at least four arguments regarding federal law. It is premised on the argument that *Daubert* applies in an FELA case tried in state court instead of a state statute on the admissibility of scientific testimony. Secondly, the Question assumes that the scientific testimony in the case was inadmissible under *Daubert*. Third, it includes the argument that if scientific testimony did not meet the requirements of the *Daubert*, it would not be sufficient evidence to uphold a verdict, even if the defendant failed to object to the evidence. Fourth, the Question Presented is based on an argument that the scintilla of evidence rule was not adopted by this Court in *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957) but was applied by the Georgia Court of Appeals.

None of the four arguments were raised by Norfolk Southern in the Georgia courts. First, it did not object to the evidence at trial at all. It never asserted that *Daubert* applied in an FELA case tried in state court, either in the trial court or on appeal. Although it cited *Daubert* and some other federal cases in its motion in limine and in its appellate briefs, they were cited for the proposition that Georgia law would not admit the evidence, not for the argument that federal law applied instead of Georgia law. This Court, of course, does not have any jurisdiction to decide what the Georgia

law of evidence requires and is bound by the decision of the Georgia courts. Norfolk Southern never asserted before its Petition for Certiorari that federal law required that the *Daubert* Rule be applied in an FELA case tried in state court, instead of the state rule of evidence.

Similarly, Norfolk Southern never asserted below that the scientific testimony was inadmissible under the *Daubert* Rule. It never sought to have the trial judge conduct a hearing to review the factors stated in *Daubert*. It never asserted in the Georgia Court of Appeals that the evidence was inadmissible under *Daubert*. Nor could it have made that argument since it failed to object to admissibility of the evidence at trial and therefore did not preserve the issue for appeal. Under Georgia procedural law, its prior motion in limine did not preserve any issue of admissibility because it did not insist on a ruling by the trial court before or during trial. *Delong v. State*, 185 Ga. App. 314, 363 S.E.2d 811 (1987).

Norfolk Southern attempts to finesse its failure to object to the evidence at trial or to assert in the Georgia Court of Appeals that the federal *Daubert* Rule applied instead of the Georgia evidence rule, by asserting that even if the testimony was admitted without objection, it can raise the *Daubert* issue under the pretext of a sufficiency of the evidence argument. Its assertion should be rejected for at least two reasons. First, Norfolk Southern cannot avoid its failure to object to the evidence on the basis that it moved for a directed verdict on the basis of the sufficiency of the evidence. It asserts on page 17 of its Petition that "courts have looked to *Daubert* in determining sufficiency-of-evidence questions in FELA actions." The cases it cites do not support the assertion.

One of the cases cited by Norfolk Southern in support of its assertion was *Marbled Murrelet v. Babbitt,* 83 F.3d 1060 (9th Cir. 1996). The case not only does not support the assertion but, in fact, compels just the opposite conclusion. The Ninth Circuit held that the defendant waived its *Daubert* objections by failing to request a ruling on the admissibility of the evidence, just as Norfolk Southern failed to request a ruling in this case and could not assert them under the pretext of a motion on the sufficiency of the evidence. It reasoned that by failing to object the defendant deprived the plaintiff of "the opportunity to lay a better foundation for the evidence". *Id.* at 1067. The Court concluded that permitting the defendant to challenge on appeal the reliability of the scientific evidence under *Daubert* "in the guise of an insufficiency-of-the-evidence argument" would give the defendant an unfair advantage and would not be permitted. *Id.*

The other federal cases cited by Petitioner, *Smelser v. Norfolk Southern Ry. Co.,* 105 F.3d 299 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 67 (1997) and *Hughes v. International Diving & Consulting Servs., Inc.*, 68 F.3d 90 (5th Cir. 1995), do not support its argument because in both there was an objection at trial on the basis of *Daubert*. The decisions merely dealt with whether the objections should have been sustained and whether without the scientific evidence there was sufficient evidence. Neither support a claim that a party can fail to object to the admissibility of the evidence at trial but raise the same argument on appeal under the guise of the sufficiency of the evidence. As noted in *Claar v. Burlington N. R.R. Co.,* 29 F.3d 499 (9th Cir. 1994), another case incorrectly cited by Norfolk Southern, the sufficiency of causation evidence under FELA and the admissibility of expert testimony are separate and distinct issues. *Id.* at 503.

Second, even if the reliability of the causation evidence can be raised on motion for directed verdict despite the fact that no objection was made to the evidence, Norfolk Southern did not raise in its motion at trial any of the arguments it now asserts. Specifically it did not contend as it asserts in the Question Presented that "unreliable" expert testimony under the federal *Daubert* Rule is insufficient evidence of causation in an FELA case tried in state court. The only bases given for its motion for directed verdict at trial were: (1) that "there's no study linking nasopharyngeal cancer itself with diesel exhaust"; and (2) that "all the studies shown have relative risks well below two." (T.828). Both of the bases were factually incorrect. Drs. Lipsey and Epstein had referenced three studies linking nasopharyngeal cancer with whole diesel exhaust and over forty studies showing one of the principal components of diesel exhaust caused nasopharyngeal cancer, a number of which had relative risks substantially in excess of two. (T.729-32, 743).

Those two limited factual arguments clearly did not preserve for appeal the sufficiency-of-the-evidence argument now asserted in the Question Presented in the Petition for Certiorari. Georgia procedural rules, just like the federal rules, require that the basis for a motion for judgment as a matter of law be asserted with specificity at trial in order to preserve it for appeal. O.C.G.A. § 9-11-50 (a). Fed. R. Civ. P. 50(a)(2).

Norfolk Southern also failed to assert the insufficiency-of-the-evidence argument set out in the Question Presented in the Georgia Court of Appeals. Although it claimed that the trial court erred in denying its motion for a directed verdict and its post-trial motion, the basis for its claim was not that *Daubert* applied in an FELA case tried in state court and that the causation testimony was not admissible. Rather, its argument in the Georgia Court of Appeals was based on

the incredible assertion that Dr. Epstein's testimony about specific causation was too "equivocal" because he used the word "incriminates". Consequently the decision focused on rejecting that argument by reciting the clear meaning of Dr. Epstein's testimony.

In its Petition for Certiorari to the Georgia Supreme Court, Norfolk Southern also failed to assert the arguments tendered here. It did not claim that the *Daubert* Rule applied in the Georgia courts when they heard FELA cases. It did not claim that the evidence was insufficient because the causation evidence would be inadmissible under the Rule. Instead, it claimed that the Court of Appeals erred in concluding that the evidence was admissible under Georgia law and it urged the Court to adopt a new test for the admissibility of scientific evidence in Georgia. Thus neither the Georgia Court of Appeals nor the Georgia Supreme Court was ever asked by Norfolk Southern to rule on the specific issue which it now claims is the "Question Presented" by this case.

3. The Georgia Courts Did Not Rule on the Claimed Federal Question.

Neither the Georgia Court of Appeals nor the Georgia Supreme Court ruled on the issues now asserted by Norfolk Southern. The Georgia Court of Appeals decision mentions that *Daubert* was decided under F.R.E. 702 instead of the Georgia statute on the admissibility of expert testimony not because either Norfolk Southern was raising, or the Court was ruling on, the issue of whether the federal rule of evidence applied in the trial of an FELA case in a Georgia state court. It referenced *Daubert* only because Norfolk Southern cited cases decided under the federal rule in support

of its argument that the testimony was not admissible under Georgia law. Since Norfolk Southern never argued that federal law governed on the admissibility of the scientific evidence, and never even asserted that the evidence was inadmissible, the Court of Appeals never was asked and did not decide that issue.

Similarly the Georgia Court of Appeals did not decide the case based on the scintilla of evidence rule, as claimed by Petitioner. Norfolk Southern argues that the Georgia Court of Appeals upheld the verdict based on the scintilla of evidence rule and that there is a split in the federal circuits on whether an FELA plaintiff need present only a scintilla of evidence or something more. Even if there is a split in the circuits, the Court of Appeals did not decide the case on the scintilla of the evidence rule. In fact, the Georgia Court of Appeals decision appears to have been based on a standard more rigorous than any federal circuit court has required.

After reviewing in detail Dr. Epstein's testimony, the Court of Appeals held that it was sufficient to authorize the verdict. It noted that under FELA the test is "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury", quoting from the controlling decision of this Court in *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957). Ct. App. Op. at 7. But the Georgia Court of Appeals went further and held that even if the lesser quantum of evidence standard under FELA was not applicable and the normal sufficiency of evidence standard required in cases generally applied, the evidence was "sufficient to demonstrate a 'reasonable probability' of a causal connection between the decedent's exposure to diesel exhaust and his nasopharyngeal cancer." *Id.* There simply is no basis for

Norfolk Southern's assertion that the decision was based on the scintilla of the evidence rule. Moreover, as will be discussed in more detail *infra* there was more than sufficient evidence under any possible standard to support the jury's conclusion of causation.

Finally, it must be noted that Norfolk Southern did not contend in its Petition for Certiorari to the Georgia Supreme Court that the Court of Appeals applied the wrong standard for sufficiency of the evidence. In fact in its petition, it reversed its argument from the Court of Appeals and claimed that the issue was admissibility, not sufficiency of the evidence. It no doubt took that position because Rule 40 of the Rules of the Supreme Court of Georgia provided that certiorari normally would not be granted for an alleged insufficiency of the evidence. In any event, Petitioner never requested the Georgia Supreme Court to decide the standard to be used for determining the sufficiency of the evidence and therefore, is precluded from attempting to raise the issue in this Court.

B. The Georgia Court of Appeals Correctly Concluded that There Was Sufficient Evidence of Causation.

Norfolk Southern is really challenging the admissibility of the causation evidence. It has phrased the issue and fashioned its arguments as a challenge to the sufficiency, instead of admissibility, of the evidence because it did not preserve any issue on admissibility. The whole premise of its sufficiency of the evidence argument is that the federal *Daubert* Rule applies in an FELA case tried in state court, instead of the state rule of evidence, and it claims that the evidence here does not comply with the federal rule. Respondent will address first Norfolk Southern's premise that *Daubert* applies.

1. The Georgia Statute on Expert Testimony Governs.

It has long been black-letter law that federal law controls on substantive issues in an FELA case, but state law governs on procedural issues such as the admissibility of expert testimony. There is no conflict in the federal circuits or between the various state courts on the principle. The substantive/procedural distinction in an FELA case tried in state courts is universally accepted. The principle appears to stem from a series of early decisions in this Court.

In *Central Vermont Ry. Co. v. White*, 238 U.S. 507 (1915) this Court held that the question of whether the defendant had the burden of proof on contributory negligence was governed by federal law in an FELA case tried in state court. In reaching its holding the Court noted that procedural matters such as "the form of the action, sufficiency of the pleadings, [and] rules of evidence" are governed by state law, but concluded that the burden of proof on contributory negligence was not a procedural matter but was substantive, and therefore governed by federal law. *Id.* at 511-12. A year later in *Chesapeake & Ohio Ry. Co. v De Atley*, 241 U.S. 310 (1916) the Supreme Court considered whether the state practice instead of the federal practice regarding jury instructions governed in an FELA case tried in state court. It affirmed the principle that local rules of practice and procedure govern, citing *Central Vermont Ry. Co.* and *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916). In *Bombolis* the Court held that a state rule allowing a nonunanimous verdict governed instead of the Seventh Amendment unanimity requirement. The Court reasoned that because Congress provided for the enforcement of a federal right in state courts under FELA, it intended state procedure to govern.

In the years since, this Court has often repeated the general principle that FELA cases adjudicated in state courts are subject to state procedural rules, including the rules of evidence. *See, e.g., St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985) and the cases cited therein. Although on some issues it is not easy to distinguish substance from procedure, generally this Court has refused to apply state procedural rules only when they operate to defeat the rights of workers under FELA. *See, e.g., Brown v. Western Railway of Alabama*, 338 U.S. 294, 296 (1949) (holding, after acknowledging the general principle, that the federal right created by FELA "cannot be defeated by the forms of local practice").

The policy behind the general principle is fundamental to our system of distinct federal and state courts, both of which can hear claims based on the other's law. As Professors Wright, Miller and Cooper noted in their treatise:

> There are compelling reasons for adhering to the general rule that federal law takes state courts as it finds them. The Supreme Court itself has an interest in permitting the state courts to follow procedure that they find familiar, uniform, and good. This interest is so strong, and so well accepted, that state courts and litigants routinely employ state procedure without further thought both in cases that mix federal questions with state questions and in cases that present only federal questions.

16B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction 2d.*, § 4023 at 345 (1996).

These comments are particularly applicable to the rules of evidence. It is no doubt true that all state courts which have tried FELA cases have routinely applied their own rules of evidence instead of the Federal Rules of Evidence, just as federal courts in diversity cases apply the Federal Rules instead of state law. Every state case specifically addressing the issue, including Georgia, has ruled that the state rules of evidence apply instead of the Federal Rules in an FELA action tried in state court. *Eubanks v. CSX Transp., Inc.*, 223 Ga. App. 616, 478 S.E.2d 387 (1996); *Keith v. Burlington N. R.R. Co.*, 889 S.W.2d 911, 919 (Mo. App. 1994); and *Faulkenberry v. Kansas City S. Ry. Co.*, 602 P.2d 203, 208 n.19 (Okla. 1979). Similarly, federal courts have held that the Federal Rules of Evidence apply in diversity actions based on state law because the rules of evidence are procedural and governed by the law of the forum. *See, e.g., Stutzman v. CRST, Inc.*, 997 F.2d 291, 295 (7th Cir. 1993) (holding that admissibility of expert testimony was procedural, not substantive).

The exact issue was presented recently in *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257 (Tenn. 1997), *cert. denied*, 118 S. Ct. 2296 (1998). The Tennessee Supreme Court applied state law instead of federal law in evaluating the admissibility of scientific testimony in an FELA case tried in state court. CSX petitioned for certiorari to this Court on this issue of whether the federal *Daubert* Rule instead of state law should govern, and this Court denied the petition. The Georgia courts, consistent with the recognized practice in all state courts and all of the reported decisions, applied the Georgia rule on the admissibility of expert testimony.

2. The Medical Causation Evidence Was Admissible Under *Daubert*.

Even if the federal *Daubert* Rule applied and Norfolk Southern had objected to the admissibility of the evidence, it is clear from the record that the evidence was scientifically reliable and more than sufficient under *Daubert*. Moreover, admission of the evidence clearly was not an abuse of discretion under *General Electric v. Joiner*, 118 S. Ct. 512 (1997). Norfolk Southern's assertion that the medical causation evidence was unreliable simply is not supported by the record.

Plaintiff's lead expert on medical causation was Dr. Samuel Epstein from the University of Illinois School of Public Health, whose "unchallenged testimony . . . qualified him as an expert in chemistry, pathology, internal medicine, toxicology, cancer causation and the carcinogenic properties of diesel exhaust." Ct. App. Op., p.5. Dr. Epstein testified "that the preponderance of evidence clearly incriminates diesel exhaust as the cause of [Phil Baker's] fatal nasopharyngeal cancer." (T.728)

As the Georgia Court of Appeals explained in its review of the record evidence, Dr. Epstein explained that his opinion was based on the generally-accepted methodology for determining whether a chemical has caused or contributed to causing cancer, including the evidence of the amount and duration of exposure, the chemistry of diesel exhaust, genetic testing, animal studies and human studies. (T.722-25, 728). When asked what evidence regarding the chemistry of diesel exhaust led him "to your conclusion that diesel exhaust caused Phil Baker's nasopharyngeal cancer", (T.734), he responded that diesel exhaust contains a wide range of chemicals known to cause

cancer. (T.734-39). He noted that diesel exhaust had levels of some known carcinogens five hundred times higher than cigarette smoke. (T.734). He also testified that there was "clear and unequivocal and unarguable evidence" that one of the major components of diesel exhaust, formaldehyde, causes nasopharyngeal cancer. (T.735).

In regard to genotoxicity, Dr. Epstein explained that there have been a wide range of studies starting in the late 70's by the Environmental Protection Agency showing that whole diesel exhaust induces mutations or genetic changes in various tests. (T.740). The significance of such genetic testing is that it is considered to be strong evidence of carcinogenicity. (T.725).

Dr. Epstein next discussed the animal studies. A fundamental principle of toxicology is that well-designed animal studies are predictive of human results. (T.596). Dr. Epstein explained that whole diesel exhaust had caused respiratory cancers in various animal models. One of the principal components of diesel exhaust, formaldehyde, had been shown in numerous animal studies to cause the animal equivalent of nasopharyngeal cancer. (T.741). Finally, Dr. Epstein discussed the published studies of exposed workers like Phil Baker. He testified that there were three epidemiological studies that showed that whole diesel exhaust caused nasal cancers in railroad and other workers. (T.730-32, 742). Dr. Epstein also noted that there were a large number of studies, including thirteen major reports, which "clearly showed the association of formaldehyde and nasopharyngeal cancer." (T.742). One of the studies was by a National Cancer Institute senior scientist and involved the review of thirty-seven epidemiologic studies, involving thousand of workers. (T.742-43). Dr. Epstein concluded his review of the scientific evidence by noting that all of the

relevant governmental agencies from the National Cancer Institute to the International Agency for Research on Cancer have concluded that diesel exhaust and its components were probable human carcinogens. (T.744).

Plaintiff also presented the testimony of Dr. Richard Lipsey, an expert in toxicology. Dr. Lipsey did an exposure assessment in connection with Phil Baker in which, based on the available data, he calculated the level of various chemical components of diesel exhaust to which Mr. Baker was exposed in his employment. (T.598, 602-606). He opined that the levels were in excess of those permitted by governmental agencies. (T.609). Although Dr. Lipsey was not permitted to testify as to medical causation regarding Mr. Baker, as a toxicologist he was allowed to testify that diesel exhaust is a cause of nasopharyngeal cancer. (T.611).

Finally, Plaintiff offered the testimony of Robert Howard, M.D., one of Mr. Baker's treating physicians. He investigated the probable cause of Mr. Baker's nasopharyngeal cancer and told Mr. Baker at the time that the most probable cause was his prolonged exposure to diesel exhaust at work. (T.520). Dr. Howard reaffirmed his opinion at trial and testified that neither Mr. Baker's prior smoking, alcohol consumption, or woodworking activities played any role in causing his cancer. (T.526-28).

Norfolk Southern asserts that the above evidence was unreliable under *Daubert* because plaintiff's expert witness "could not identify even a *single* epidemiological study linking diesel exhaust with nasopharyngeal cancer." In fact, both Dr. Epstein and Dr. Lipsey identified three studies that associated whole diesel exhaust with nasopharyngeal cancer,

(T.729-32), and approximately forty studies, involving thousand of workers, which "clearly showed the association of formaldehyde, [one of the principal components of diesel exhaust], and nasopharyngeal cancer." (T.742-43). Norfolk Southern also asserts that a draft E.P.A. report concluded that formaldehyde was not carcinogenic. It did nothing of the sort. E.P.A. has long recognized formaldehyde as a probable human carcinogen. (T.819-21, 752).

The extensive testimony on medical causation clearly demonstrated that the factors set out in *Daubert* required admission of the evidence, including general acceptance, peer-reviewed publication, rate of potential error, and testing. Respondent attempted to offer more extensive testimony on the factors, but the Court, having no objection to the evidence, required counsel to move on. (T.735-37, 743, 746). Norfolk Southern, having failed to object, cannot now assert that there was insufficient consideration of the factors. *Marbled Murrelet v. Babbitt*, *supra*, at 1067.

Norfolk Southern is remarkably silent about the testimony of its own medical expert, Dr. William Morgan. Although Dr. Morgan is a professional witness who testifies exclusively on behalf of industrial defendants in cases involving exposure to almost any hazardous substance in the workplace, particularly on behalf of the railroad industry, he essentially confirmed the elements of Plaintiff's causation evidence. (T.969-972). He acknowledged that diesel exhaust contains one or more chemicals that are generally regarded as carcinogenic and that diesel exhaust has been found to be more mutagenic than cigarette smoke. (T.979). Indeed, he conceded that one study showed diesel smoke is one hundred times more potent than cigarette smoke. (T.981). He acknowledged that formaldehyde is mutagenic and that animal studies have documented that it causes nasal cancers. (T. 996-997).

3. The Causation Evidence Was More Than Sufficient

Not only was the evidence reliable under *Daubert*, it was more than sufficient in an FELA case to support the jury verdict. The standard of review of the sufficiency of the evidence in an FELA case is a lenient one, particularly in regard to causation. This Court held in *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 507 (1957) that the jury could determine causation if there is any evidence that justifies with reason, the conclusion that employer negligence played any part, even the slightest, in producing the injury. More recently, in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994), the Supreme Court reaffirmed that there was a "relaxed standard of causation" in FELA cases, citing *Rogers*.

Norfolk Southern argues that there is a split in the Circuits between whether *Rogers* adopted a "scintilla of evidence" rule or a "more than a scintilla" standard, citing *Aparicio v. Norfolk & Western Ry. Co.*, 84 F.3d 803 (6th Cir. 1996). The Sixth Circuit in *Aparicio* pointed out, however, that the more-than-a-scintilla approach may be a distinction without a difference:

> "More than a scintilla" means precious little more than a scintilla given the Supreme Court's view that Congress has favored Federal Employers' Liability Act plaintiffs with a jury resolution of all colorable factual issues. *Rogers*, 352 U.S. at 510, 77 S.Ct. at 451. Thus, we hold that *Brady* and *Rogers* require a Federal Employers' Liability Act plaintiff to present more than a scintilla of evidence in order to create a jury question on the issue of employer liability, but not much more.

Id. at 810-11.

In this case the Georgia Court of Appeals noted the lesser quantum of evidence in FELA case, but after reviewing the causation evidence concluded that even if there was no lesser quantum required, the evidence was sufficient to demonstrate a "reasonable probability" of a causal connection between the decedent's exposure and his cancer. Ct. App. Op. at 7. The above discussion of the evidence and any fair reading of the transcript compels the conclusion that even in the absence of a lesser standard in FELA cases, the evidence of causation was scientifically reliable, admissible in evidence, and more than sufficient for a jury to conclude that there was causation.

CONCLUSION

For the reasons stated above, the Petition for Certiorari should be denied.

Respectfully submitted,

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